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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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R. C. WOOD, JOHN L. McGINN and JOHN A. JESSON,  
Appellants,  
vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank,  
a corporation, organized under the Laws of the State of  
Nevada,  
Appellee.

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**BRIEF OF APPELLANTS.**

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Filed this.....day of May, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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R. C. WOOD, JOHN L. MCGINN and  
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*Appellants,*

vs.

F. G. NOYES, as Receiver of the  
WASHINGTON-ALASKA BANK,  
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Laws of the State of Nevada,

*Appellee.*

No. 2529

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BRIEF OF APPELLANTS.

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This was an action brought by F. G. Noyes, as receiver of the Washington-Alaska Bank, to recover from various stockholders of the corporation the amount of money which they had severally received by reason of a declaration and payment of a dividend upon the capital stock, said dividend amounting to twenty per cent. (20%), or \$20.00 per share on its then outstanding capital stock of \$168,800.00.

It was alleged in the complaint that on and for a long time prior to April 12, 1910, said Washington-Alaska Bank, then known as the Fairbanks Banking Company, was in a grossly insolvent and bankrupt condition (p. 4), and its assets were insufficient in value by more than \$200,000.00 to pay its deposits and other liabilities (p. 10); that notwithstanding said grossly insolvent and bankrupt condition of said bank, the board of directors did on said 12th day of April, 1910, wrongfully and fraudulently declare and ordered to be paid the dividend aforesaid to the then stockholders of said bank (p. 6), and that on said 12th day of April, 1910, said Washington-Alaska Bank owed to depositors the sum of \$867,972.28, and had other liabilities amounting to \$83,717.53 (p. 6).

The amended answer of the defendants appearing denies that the bank was insolvent or the dividend fraudulent (p. 15) or that defendant Wood received any dividend for or on account of any stock. Defendant Wood further sets up that the dividend declared and paid to him was paid to him for the use and benefit of Joseph Conta, who was the true owner of the shares of stock standing in the name of said Wood (p. 18); and that at the time the dividend was declared and he received the same, the bank was solvent, and the defendant Wood believed it so to be, and received said dividend in good faith and in the honest belief that said bank was solvent, and said Wood paid to said Conta the amount of said divi-

dend so received by him prior to any notice that said bank was insolvent and could not meet its liabilities (p. 19).

The defendants further set up that E. T. Barnette was the president and a director of said Washington-Alaska Bank (pp. 21, 22).

That the bank closed its doors on January 4, 1911, and receivers were appointed (p. 21);

That the receivers intended to bring an action against Barnette, who was at that time out of the Territory of Alaska (pp. 21-22);

That Barnette shortly afterward returned and negotiated with the receivers for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of his liability to the creditors of the bank and on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911 (p. 22);

That as a result of said negotiations and in full satisfaction of the liability of said Barnette, he and his wife executed an instrument in writing by which Barnette admitted his liability and promised and agreed to pay all the depositors and holders of unpaid drafts in full to the amount of any deficiency that might be found to exist on the 8th day of November, 1914 (p. 22);

That the promises were made on the distinct understanding and agreement that no litigation would

be instituted against Barnette for any act done by him while president and director; that to secure the performance of the promises made by Barnette and his wife they conveyed to the receivers with the knowledge, consent and approval of the Court, properties in Mexico and Alaska which were worth over the sum of \$600,000 (pp. 23-24);

That the receivers accepted and received the promises and deeds to said property in full satisfaction of all claims of whatsoever nature that existed against the said Barnette on account of his management of the affairs of said bank and on account of his acts as president and director of said corporation (p. 26);

That the promises of Barnette and his wife and the deeds were given upon the understanding and agreement that they were in full satisfaction of any liability of Barnette on account of the declaration of the dividend and in discharge of any causes of action against him on account thereof and they were accepted by the receivers of said bank upon the understanding that they were in full satisfaction of the liability of said Barnette to the creditors of said bank (p. 27);

That the receivers have received from the rents and issues of the Alaska property \$31,400 in cash; that the value of the property conveyed to them in Alaska, in Fairbanks is \$25,000; the value of the mining property situate in Fairbanks Recording District is \$20,000 and the value of the Mexican property could not be definitely determined at that time but that it was of

great value and was at the time of the execution of the deed of the value of \$500,000 (p. 28) and

That the receivers have received full and complete satisfaction of any and all claims for and on account of the declaration and payment of the dividend made by the Fairbanks Banking Company (p. 28).

### ASSIGNMENT OF ERRORS.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 2 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time said dividend was declared and paid, the said Fairbanks Banking Company had undivided profits amounting to said sum of \$33,-720.00 and said dividend was declared and paid out of the undivided profits of said bank.

#### Assignment of Error No. 1.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 4 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the end of the fiscal year of the Washington-Alaska Bank and of the Fairbanks Banking Company was the 31st day of December of each year, and at said time it had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their

officers was bad and uncollectible and which had not been charged off during said fiscal year.

Assignment of Error No. 2.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 5 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said bad debts due to the bank and so charged off were not after said time carried as an asset of said bank; and, after said bad debts had been deducted from the assets, any profits that were shown to exist, after the deduction of all liabilities including outstanding stock, were placed in the undivided profit account, and were so carried until the end of the next fiscal year unless a dividend was declared upon the same or bad debts charged against the same during the next succeeding fiscal year.

Assignment of Error No. 3.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 6 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of loans and discounts of said bank that he considered bad and uncollectible.



That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible, and presented the same to said R. C. Wood and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$8,599.59.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31st, 1909, amounting to the sum of \$56,106.97.

#### Assignment of Error No. 4.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 7 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

#### Assignment of Error No. 5.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 8 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said R. C. Wood was a man of high

standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the condition of said Washington-Alaska Bank, and the securities held by it for loans made by, and due to, said bank.

Assignment of Error No. 6.

The Court erred in refusing to make the Finding of Fact set forth in paragraph II of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the end of the fiscal year 1909, the said R. C. Wood requested J. A. Jackson, cashier of the Fairbanks Banking Company, to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of \$24,937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31st, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of \$9,881.78.

Assignment of Error No. 9.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 12 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

Assignment of Error No. 10.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 12 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the meeting of the board of directors of said Fairbanks Banking Company held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts hereinbefore mentioned had been charged off, were presented by the officers of said banks to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed. That said statements showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of \$56,106.97. That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending

December 31st, 1909, after deducting all the bad debts, was the sum of \$9,881.78.

Assignment of Error No. 11.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 14 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That upon the 12th day of April, 1910, the directors of the Washington-Alaska Bank declared a dividend of \$50,000.

Assignment of Error No. 12.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 15 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend of the Washington-Alaska Bank of Washington, to wit, \$50,000, was paid to its stockholders the Fairbanks Banking Company, \$25,000 of which said sum was ordered by the directors to be placed to the credit of the undivided profit account of said Fairbanks Banking Company, and the other \$25,000 was directed to be credited on the account for which said Fairbanks Banking Company was carrying the stock of said Washington-Alaska Bank.

Assignment of Error No. 13.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 16 of the defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That after said sum of \$25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of said bank at said time amounted to the sum of \$34,828.55.

Assignment of Error No. 14.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 17 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time of the declaration of said dividend, and after the adding of said sum of \$25,000 to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of \$34,828.55, and the directors at said time honestly and in good faith believed that the undivided profits of said Fairbanks Banking Company was said sum of \$34,828.55, and said directors were so advised by the officers of said bank.

Assignment of Error No. 15.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 19 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said Fairbanks Banking Company, at the time of the declaration of the dividend was carrying the stock of the Gold Bar Lumber Com-

pany for the sum of \$341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said property and the value thereof, had a right to believe, that said property was worth said amount.

Assignment of Error No. 17.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 20 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company, for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of \$27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

Assignment of Error No. 18.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 21 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend was declared by said directors of said bank in good faith and in the honest

belief, and after the exercise of due care, that the undivided profits of said bank amounted to the sum of \$34,828.55, and that the values placed upon the assets of said bank was the true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

Assignment of Error No. 19.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 22 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the dividend so paid to the stockholders, and which was received by the defendants answering in this case, was received by them without knowledge on their part that said bank did not have any surplus or undivided profits out of which said dividend could be declared or paid, or that the same was paid out of the capital of said bank; and they and each of them received the same in good faith and in the honest belief that the same was declared and paid to them out of the surplus and undivided profits of said bank.

Assignment of Error No. 20.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 26 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in the month of March, 1911, the then receivers of the Washington-Alaska Bank, formerly Fairbanks Banking Company, intended to

bring a suit or action in the District Court for the Territory of Alaska, Fourth Judicial Division, against E. T. Barnette, who had been the president of said Fairbanks Banking Company, and a director thereof, from the time of its organization as a corporation on March 12, 1908, until it closed its doors on January 4, 1911, and as such was active and influential in the management and control of said Fairbanks Banking Company.

Assignment of Error No. 21.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 27 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That at the time of the suspension of said bank, said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said Washington-Alaska Bank, and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against the said E. T. Barnette on account of his liability to the creditors of said bank on account of his management thereof from the time of its organization on the 12th day of March, 1908, until the 4th day of January, 1911.

Assignment of Error No. 22.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 28 of the defendants'



proposed Findings of Fact and Conclusions of Law, and which is as follows:

That as a result of said negotiations, and in full satisfaction of all liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank for and on account of the acts and wrongs done by him, if any, during said time that he was president and director thereof, the said E. T. Barnette and Isabelle Barnette, his wife, executed an instrument in writing in which the said E. T. Barnette admitted his liability to the creditors and depositors of said bank and promised and agreed to pay all of the depositors and holders of unpaid drafts of said bank in full any deficiency that might be found to exist upon the 18th day of December, 1914, between the amounts due said depositors and holders of unpaid drafts on the 4th day of January, 1911, with interest thereon at the rate of six per cent. per annum from said 4th day of January, 1911, until the same should be paid, and the amount realized out of the property and assets of said Washington-Alaska Bank and paid to said depositors and holders of unpaid drafts.

Assignment of Error No. 23.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 29 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said Isabelle Barnette was and is the wife of said E. T. Barnette, and the said Isabelle Barnette joined in said instrument in writing because of her desire to aid her said husband in paying

the creditors and depositors of said Washington-Alaska Bank.

Assignment of Error No. 24.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 30 of the defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said promises were made on the distinct understanding and agreement that no litigation would be instituted against the said E. T. Barnette or any other person or persons jointly liable with him for any act or deed done by him during the time that he was president and director of said bank as aforesaid; and that, for the purpose of preventing any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said E. T. Barnette and Isabelle Barnette on the 18th day of March, 1911, with the knowledge, consent and approval of this Court, conveyed to the receivers of said Bank, and the said receivers, by order of this Court, accepted a conveyance of title to an improved plantation containing 18,723 acres of land situated in the Republic of Mexico, and certain improved and income producing business property and lots situated in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situated in the Fairbanks Precinct, Territory of Alaska; all of which property belonged, at the time of said conveyances, to said E. T. Barnette and Isabelle Barnette, and were and are worth the sum of \$500,000, a sum greatly in excess of all the unpaid debts and liabilities of said bank.

Assignment of Error No. 25.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 31 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in said deed of property situated in the Republic of Mexico, as well as in the deed to property situated in Alaska, it is expressly provided that if the depositors and holders of unpaid drafts are not paid in full by the 18th day of November, 1914, either out of the property and assets of said Washington-Alaska Bank, or otherwise, or by the said E. T. Barnette and Isabelle Barnett, said receivers may sell all or any part of said land at private sale for the best possible prices obtainable; and that the moneys and funds derived from the sale of said properties shall then be paid to the depositors and owners of unpaid drafts in an amount sufficient to pay their claims and demands in full; and that, if the proceeds derived from the assets of said bank and the amounts realized from the sale of said properties shall be insufficient to pay said depositors and owners of unpaid drafts in full, then the same is to be disbursed amongst said depositors and owners of unpaid drafts pro rata; and that if the amount derived from the sale of said property shall exceed the amount sufficient to satisfy said amounts in full, with interest as above set forth, then the balance is to be returned to said E. T. Barnette and Isabelle Barnette.

And it is further provided in said deeds that if, after applying the moneys received from the property and assets of said Washington-Alaska Bank and the sale of said properties mentioned in said deeds, and any moneys obtained from George Edgar Ward and W. B. Biggs on account of an

option given to them upon the 18th day of November, 1909, to purchase an undivided 49/100 interest in and to said Mexican property for the sum of approximately \$225,000.00 there shall still remain a balance due said depositors and holders of unpaid drafts, the said E. T. Barnette and Isabelle Barnette promise and agree to pay said balance in full.

Assignment of Error No. 26.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 32 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That in said deed of the property situate in the Territory of Alaska, the receivers and their successors are authorized and empowered to take possession of the same and to receive and collect the rents, royalties and issues thereof, and disburse the same to the depositors and holders of unpaid drafts, under the orders of this Court and that, in the event the said E. T. Barnette and Isabelle Barnette and the said receivers or their successors shall deem it at any time advisable to sell any of said real estate situate in Alaska, that the same may be done by said receivers, and the proceeds derived from such sale disbursed to the depositors and holders of unpaid drafts, under the order of this Court.

Assignment of Error No. 27.

The Court erred in refusing to make the Findings of Fact set forth in paragraph 33 of defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the said receiver, plaintiff herein, holds a large amount of property belonging to said bank, which is of great value and has not been converted into money, and said property so held by him, and the property so conveyed to the receivers by said E. T. Barnette and Isabelle Barnette are more than sufficient to satisfy all the claims, demands and obligations of creditors of said Washington-Alaska Bank.

Assignment of Error No. 28.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 34 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That on the 29th day of March, 1911, the then receivers of the Washington-Alaska Bank agreed to accept in full satisfaction of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank the said deeds of said property upon the terms and conditions thereof and the said promises of the said E. T. Barnette and Isabelle Barnette therein, and the said E. T. Barnette and Isabelle Barnette made, executed and delivered said deeds and made the said promises contained therein upon the direct understanding and agreement that the same were in full satisfaction of all suits or causes of action then existing against said E. T. Barnette on account of any and all matters and things arising from his connection or management of the affairs of the said Fairbanks Banking Company, afterwards known as Washington-Alaska Bank, and in full satisfaction of all liability of the

said E. T. Barnette to the creditors of said Washington-Alaska Bank; and that said receivers accepted and received said promises and said deeds to said property upon order of this Court in full satisfaction of all claims and causes of action of whatsoever nature that existed against the said E. T. Barnette for and on account of his management of the affairs of said bank from the 12th day of March, 1908, to the 4th day of January, 1911, and for and on account of his acts as president and as a director of said corporation.

Assignment of Error No. 29.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 35 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the receivers of said Washington-Alaska Bank, before the delivery and acceptance of said deeds hereinbefore mentioned, intended to, and if said agreement and deeds had not been made, executed and delivered to said receivers as hereinbefore stated, would have instituted an action against said E. T. Barnette to recover from said E. T. Barnette the amount of the dividend which was declared by said Fairbanks Banking Company upon the 12th day of March, 1910, and which in the complaint in this action, in paragraph 4 thereof, is alleged to have been declared wrongfully and fraudulently.

Assignment of Error No. 30.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 36 of defendants'

proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the promises of said E. T. Barnette and Isabelle Barnette and the deeds to the property hereinbefore mentioned were given by the said E. T. Barnette and Isabelle Barnette upon the express understanding and agreement that the same were in full satisfaction of any liability of the said E. T. Barnette on account of the declaration of said dividend and in discharge of any causes of action against him for and on account thereof, and the same were accepted by the said receivers of said bank upon the distinct understanding that the same were in full satisfaction of the liability of the said E. T. Barnette to the creditors of said bank on account of the declaration of said dividend, and in full discharge of the said E. T. Barnette on any causes of action that might arise therefrom.

Assignment of Error No. 31.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 37 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the receivers have received from the rents, royalties and issue of the property situate in the Territory of Alaska, the sum of \$31,400;

That the value of the property situate in the town of Fairbanks, Alaska, is the sum of \$25,000;

That the value of the mining property situate in the Fairbanks Recording District, Alaska, is the sum of \$20,000;

That the value of the Mexican property cannot be definitely determined at this time, but the same

is of great value, and was, at the time of the execution of said deed, of the value of \$500,000.

Assignment of Error No. 32.

The Court erred in refusing to make the Finding of Fact set forth in paragraph 38 of defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the moneys received by the receivers from said properties and the value of the property conveyed by the said E. T. Barnette and Isabelle Barnette to the receivers as hereinbefore stated is more than ample to satisfy in full all of the liability of the said E. T. Barnette and the directors and officers of said bank to said corporation for and on account of any acts, deeds or wrongs done by them as such officers and directors, or otherwise.

Assignment of Error No. 33.

The Court erred in refusing to make and find as a conclusion of law what is set forth in paragraph 1 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said dividend was declared and paid out of the undivided profits of the Fairbanks Banking Company.

Assignment of Error No. 34.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 2 of Conclusions



of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That said defendants received said dividend honestly and in good faith, believing that the same was declared and paid out of the undivided profits of said Fairbanks Banking Company, and they had no knowledge or notice that the same or any part thereof was declared and paid out of its capital stock.

Assignment of Error No. 35.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 3 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That there was a complete accord and satisfaction, as to all of the matters and things set forth in the complaint herein, had between E. T. Barnette and Isabelle Barnette and the former receivers of said Washington-Alaska Bank, and that by reason thereof all the matters and things charged in said complaint have been fully paid and satisfied.

Assignment of Error No. 36.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 4 of Conclusions of Law in defendants' proposed Findings of Fact and Conclusions of Law, and which is as follows:

That the defendants are entitled to a judgment and decree that the plaintiff recover nothing by this

action and that they have judgment for their costs and disbursements.

Assignment of Error No. 37.

The Court erred in overruling the defendants' objection to Finding of Fact Number 6, for the reason that the same is contrary to the evidence given upon the trial of said cause, and is not supported by any evidence.

Assignment of Error No. 39.

The Court erred in overruling the defendants' objection to that portion of Finding of Fact Number 6, wherein it is stated that the fact that said dividend was paid out of the capital stock of said bank was known to defendants McGinn, Wood and J. A. Jesson, and each of them, at said time, or should have been known to them by the exercise of reasonable diligence.

Assignment of Error No. 40.

The Court erred in overruling the defendants' objection to the Conclusion of Law Number 1 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant J. A. Jesson is liable to plaintiff by reason of the payment to him of said dividend in the sum of \$2,000.

Assignment of Error No. 42.

The Court erred in overruling the defendants objection to Conclusion of Law Number 2 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant John L. McGinn is liable to plaintiff, by reason of the payment to him of said dividend, in the sum of \$2,000.

Assignment of Error No. 43.

The Court erred in overruling the defendants' objection to Conclusion of Law Number 3 of the Conclusions of Law signed and filed in this cause, and in making the same, which is as follows:

That the defendant R. C. Wood is liable to plaintiff, by reason of the payment to him of said dividend, in the sum of \$500.

Assignment of Error No. 44.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant John A. Jesson for the sum of \$2,000.

Assignment of Error No. 46.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant John L. McGinn for the sum of \$2,000.

Assignment of Error No. 47.

The Court erred in entering judgment and decree in favor of the plaintiff and against the defendant R. C. Wood for the sum of \$500.

Assignment of Error No. 48.

The Court erred in refusing to make a finding that all the matters and things charged in the complaint were fully compromised and settled by the accord and satisfaction that was entered into between E. T. Barnette and Isabelle Barnette and the former receivers of said corporation.

Assignment of Error No. 52.

The Court erred in failing to make a Finding of Fact to the effect that all the wrongs charged in the complaint have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 53.

The Court erred in failing to make a Finding of Fact to the effect that all the matters and things found against these defendants have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 54.

The assignment of error go to the following propositions:

(1) The bank had undivided profit at the time the dividend was declared sufficient to cover the amount of the dividend.

Assignments Nos. 1, 2, 3, 11, 12, 13, 14, 15, 16, 17,  
18, 34, 39, 40.

(2) The bank employed competent officials upon whom the stockholders were entitled to rely.

Assignments Nos. 4, 5, 6, 9, 10.

(3) The dividend was declared in good faith.

Assignment No. 19.

(4) The dividend was received by the stockholders in good faith.

Assignments Nos. 20, 35.

(5) The liability of the defendants was discharged by the Barnette settlement.

Assignments Nos. 21, 22, 23, 24, 25, 26, 27, 28, 29,  
30, 31, 32, 33, 36, 52, 53, 54.

These questions have all been fully discussed in our brief in No. 2528 to which we respectfully refer the Court.

We urge again every point made in that case and in addition thereto we beg to direct the Court's attention to the following:

It is impossible to sustain the judgment in this case under the pleadings. The judgment is predicated upon a condition of affairs entirely without the issues presented by the complaint, answer and reply.

The gist of the cause of action stated in the complaint is the payment to and receipt by the stockholders of the corporation of a dividend paid to them at the time when the corporation was insolvent.

The evidence did not show and the Court did not find that at the time of the declaration and payment of the dividend this corporation was insolvent. Unless the evidence showed and the Court found that the corporation was in fact insolvent at the time the dividend was declared and paid, the complaint was not sustained.

The theory of the Court below as shown by the findings was that the dividend was paid out of the capital stock of the corporation (p. 37), and was in violation of the law of the State of Nevada under which the corporation was organized (pp. 37-8).

If the plaintiff was entitled to recover on the *facts found*, his complaint is insufficient to support the judgment for the reason that there is no allegation in the complaint that the defendants received the dividend with the knowledge that the capital of the bank

was thereby impaired or with the knowledge that the dividend was paid in violation of the law of the State of Nevada. There is no averment in the complaint as to what constitutes the law of the State of Nevada on this subject, and there was no finding of the Court upon that subject either. The meager reference to the Nevada law in the findings is confined to the following:

“That said dividend was declared and paid in violation of the laws of the State of Nevada under which said corporation was organized” (p. 37).

If the plaintiff did not succeed in establishing the actual insolvency of the bank at the time the dividend was declared, he could not recover upon the complaint as framed.

The complaint does not state the necessary facts to sustain the judgment on any other theory. It did not appear from the complaint (1) that any of the defendants had any knowledge that the capital of the bank was impaired or (2) that any of them were directors of the bank or (3) that the Board of Directors in declaring a dividend knew that the bank had no profits out of which the dividend might be declared, or (4) that any of the defendants knew that the dividend was any other than a perfectly regular and lawful dividend.

In the case of *McDonald v. Williams*, 174 U. S., 397, the receiver of a National Bank had brought an

action for the purpose of recovering from the defendants who were stockholders in the bank the amount of certain dividends received by them before the appointment of the receiver. The bank suspended in January, 1893, in a condition of hopeless insolvency. The suit was brought to compel re-payment of certain dividends paid by the bank to the defendants on the ground that the dividends were fraudulently declared and paid out of the capital of the bank and not out of net profits. The defendants were ignorant of the financial condition of the bank and received the dividends in good faith, relying upon the officers of the bank and believing the dividends were coming out of the profits.

The Court said:

“The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

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“But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

“The section provides that ‘no association, or any member thereof, shall, during the time it shall con-



tinue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital.' What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly, yet in entire good faith, receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression 'withdraw or permit to be withdrawn, either in the form of dividends, or otherwise,' any portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case."

In the case of *Jesson v. Noyes* now before the Court, No. 2528, the appellants McGinn and Jesson are held liable and judgment is rendered against them as directors for declaring the identical dividend involved here. The curious result is that the directors are ordered to pay to the receiver in one action the

amount of a dividend paid to themselves as stockholders, and in the other action brought against them as stockholders, they are again ordered to pay the same amount to the receiver.

It is respectfully submitted that the judgment should be reversed.

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